MOTION FILED
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No. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

Petitioners,

v.

CRAWFORD BULLOCK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL LAWYERS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) respectfully moves the Court, pursuant to Rule 36.3, for leave to file the attached Brief as amicus curiae in support of the Respondent.

1. Respondent has consented to this filing; but counsel for Petitioner has stated he would neither consent to nor oppose it, necessitating this Motion.

2. The NACDL is a nationwide nonprofit association of some 5,000 lawyers whose practice includes criminal defense. Its principal purpose is "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself."

Since Gregg v. Georgia, 428 U.S. 153 (1976), the NACDL has actively encouraged its members to undertake the difficult work of representing defendants in capital cases. Through its publications and its adjunct, the National Criminal Defense College, the NACDL has also endeavored to train defense lawyers for this task.

NACDL members currently represent capital defendants in virtually every state which has an active death penalty, including each of the handful of states which still permit imposition of the death penalty for felony murder. The NACDL and its members also have a longstanding concern with the felony murder rule itself, and its anamolous separation of punishment from individual culpability. Both these concerns converge in the issue we believe is presented in this case.

3. The NACDL wishes to file this brief to suggest to that this case presents an appropriate opportunity to resolve an Eighth Amendment issue of historic importance: the constitutionality of the death penalty for felony murder.

We believe the Court of Appeals decision in this case could be affirmed, and Respondent could prevail, even under the narrow, ad hoc Eighth Amendment jurisprudence Petitioner has suggested this Court should adopt in this area. However, we believe that case-by-case approach would continue the uncertainty and inconsistency on this issue now prevalent in the lower courts.

We seek leave to be heard here, to ask this Court to settle this issue in a manner which will make application of the constitution in this vital area turn on the bright line of principle, and not the subtle and elusive shadings of fact presented by individual cases. The principle we believe is pointed to by reason, history, and this Court's prior decisions, is this: the death penalty is

a constitutionally excessive punishment for a killing which occurs in the course of a felony, "with or without any design to effect death ...."

DATED this 9th day of September, 1985.

Respectfully submitted,

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QUESTION PRESENTED

Does the Eighth Amendment permit the death penalty to be imposed for felony murder, without a finding that the defendant possessed a purpose to cause death?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTEREST OF AMICUS

The interest of amicus curiae is set out in the Motion accompanying this Brief.

SUMMARY OF ARGUMENT

We believe that Crawford Bullock's death sentence is excessive in relation to his individual culpability, by any test. However, we believe that the resolution of this case should turn, not on the ad hoc evaluation of the proportionality of this death sentence Petitioner suggests, but on this principle:

> It violates the Eighth Amendment to impose a penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.

Lockett v. Ohio, 438 U.S. 586, 624 (1978) (concurring opinion of Justice White).

This conclusion is pointed to by all of the "objective factors" that informed this Court's judgment in Coker v. Georgia, 433 U.S. 584 (1977) and Enmund v. Florida, 458 U.S. 782 (1982). Only such a standard can "define the crimes for which death may

be the sentence," Godfrey v. Georgia, 446 U.S. 420, 428 (1980), in a manner which provides a "meaningful basis for distinguishing the few cases in which [the death penalty may be] ... imposed from the many cases in which it [may] ... not." Furman v. Georgia, 408 U.S. 236, 313 (1972) (concurring opinion of Justice White).

ARGUMENT

I. THE "OBJECTIVE FACTORS" THIS COURT RELIED ON IN ENMUND V. FLORIDA SHOW THE DEATH PENALTY IS UNCONSTITUTIONAL FOR ANY UNINTENDED KILLING.

Writing for a unanimous Court in Morissette v. United States, 342 U.S. 246 (1952), Justice Jackson said this:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil....

> "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Pound, Introduction to Sayre, Cases on Criminal Law (1927).

342 U.S. at 250 and n.4.[1]

We believe the logic of Enmund v. Florida, supra, would apply a corollary principle to the Eighth Amendment problem presented by the imposition of a death sentence for felony murder. "'[C]ausing harm intentionally must be punished more severely than causing the same harm unintentionally.' M. Hart, Punishment and

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[1] If one had to choose the most basic principle of the criminal law in general *** it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.****
Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L. FORUM 565, 586 (1966); accord LaFave and Scott, Criminal Law 554 (1978).

Responsibility 162 (1968)." Id. at 458 U.S. 798. Because no crime can be punished more severely than by death, permitting a death sentence to be imposed for an unintentional felony murder "erodes the relation between criminal liability and moral culpability." People v. Washington, 402 P.2d 130, 134 (Cal. 1965).

Examining the purposes for which it has held a death sentence can constitutionally be imposed, the Court in Enmund noted "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,' Fischer v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)," 458 U.S. at 799, and went on to say this:

> As for retribution as a justification for executing Enmund, we think that this very much depends on the degree of Enmund's culpability--what Enmund's intentions, expectations,

and actions were. American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to "the degree of [his] criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In Robinson v. California, 370 U.S. 660, 667 (1962), a statute making narcotics addiction a crime, even though such addiction "is apparently an illness which may be contracted innocently or involuntarily," was struck down under the Eighth Amendment. Similarly, in Weems v. United States, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to "injur[e] any one by his act or inten[d] to injure any one." 217 U.S., at 363. The Court employed a similar approach in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."

> For purposes of imposing the death penalty Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

458 U.S. at 800-801.

All this points to the conclusion that punishing unintended killings by death violates the Eighth Amendment. So did much of the Enmund majority's examination of "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." 458 U.S. at 788. Surveying the complex provisions of the law of various states on this issue, the Court found only a minority of states which continued to allow the death penalty to be imposed solely for felony murder. 458 U.S. at 792. In its examination of actual capital verdicts, it noted that, even in Florida,

which has long had America's largest death row,[2] only a small fraction of death sentences --eight--had been imposed where the state "courts made no finding with respect to intent...." 458 U.S. at 795.

Although the Court's opinion in Enmund did not reach this ultimate question, the same objective factors by which it was informed thus suggested that the touchstone of the Eighth Amendment on this problem is intent to kill. Nothing has happened to change that since Enmund was decided. All of the states which the Enmund decision noted require proof of a culpable mental state relative to the death of the victim before a death sentence can be considered, see 458 U.S.

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[2] When Enmund was decided, Florida held 181 condemned prisoners. NAACP Legal Defense Fund, DEATH ROW U.S.A. 6 (June 20, 1982). It currently holds 227. NAACP Legal Defense Fund, DEATH ROW U.S.A. 7 (August, 1985).

at 790, still do. Four additional states continue to "exclude felony murder as an aggravating circumstance that will support a death sentence." 458 U.S. at 752.[3] Two others make a contemporaneous felony an aggravating circumstance, only when the killing is "intentional."[4]

Four of the remaining states which, at the time of Enmund, would have "permit[ted] a defendant who had somehow participated where a murder occurred to be sentenced to die," 458 U.S. at 792, have restricted the scope of their statutes in this regard. California has squarely held

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[3] See id. at n.13; see also Neb. Rev. Stat. §29-2523(1), and State v. Rust, 250 N.W.2d 867, 874 (Neb. 1977).

[4] See Colo.Rev.Stat. §16-11-103(6)(g); Ind. Code §35-50-2-9(b)(1). Colorado also makes it an absolute defense to any death penalty that the defendant "could not reasonably have foreseen that his conduct ... would cause, or would create a grave risk of causing, death to another person." Colo. Rev. Stat. §16-11-103(5)(e).

the statute prohibits imposition of a felony murder death sentence where a killing is not intentional. Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983). Arizona, Mississippi, and North Carolina have instituted procedures which require findings of intent or direct participation in the killing, as a prerequisite to consideration of a sentence of death.[5] Moreover, the trend the Court noted with regard to statutes recently enacted, 458 U.S. at 792, has continued. Oregon--the only state to have enacted a new death

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5 See State v. McDaniel, 665 P.2d 70 (Ariz. 1983); State v. Stokes, 304 S.E.2d 184 (N.C. 1983); Miss. Code Ann. §99-19-101(7) (1983). Georgia has similarly indicated its trial courts should require specific verdicts distinguishing between malice and felony murder, Allen v. State, 321 S.E.2d 710 (Ga. 1984), but has not yet enforced that dictate. Stephens v. Kemp, 327 S.E.2d 185 (Ga. 1985).

penalty law since Enmund--explicitly prohibits imposition of a death sentence absent a finding of homicidal intent.[6]

By our reckoning, this leaves nine states--Connecticut, Florida, Georgia, Maryland, Montana, Nevada, South Carolina, Tennessee, and Wyoming--in which the possibility of imposition of a death sentence for an unintended felony murder remains unchecked. Connecticut has imposed no death sentences. In Wyoming and Montana, all current death sentences have been the subject of reported decisions, which show each state has imposed only one death sentence exclusively for felony murder.[7] Although

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6 See 1984 Oregon Ballot Measure No. 7, Section 3(2)(a), and Ore. Rev. Stat. §163.095(2)(b) (1984).

7 See Fitzpatrick v. State, 638 P.2d 1002 (Mont. 1983); Engberg v. State, 686 P.2d 541 (Wyo. 1984).

they may not be comprehensive of all death sentences currently in effect, the reported decisions of which we are aware identify only three such sentences in Nevada,[8] one each in Maryland and Tennessee,[9] and none in South Carolina.[10] If these reported decisions are representative, that leaves only two states--Florida and Georgia--which may hold a significant number of persons under

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8 See Deutscher v. State, 601 P.2d 407 (Nev. 1979); Petrocelli v. State, 692 P.2d 503 (Nev. 1985); and Nevius v. State, 699 P.2d 1053 (Nev. 1985).

9 See Stebbing v. State, 473 A.2d 903 (Md. App. 1984); State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984).

10 In State v. Yates, 310 S.E.2d 805, 807 (S.C. 1982), the defendant was found to have intended to kill, in a count separate from the murder count. Joseph Carl Shaw, who was executed earlier this year, pled guilty to a murder count which did not specify intent to kill--but the facts of the case clearly showed it. See Shaw v. Martin, 733 F.2d 304, 306 (4th Cir. 1984).

death sentences imposed solely for felony murder. The Florida experience recounted in Enmund, 458 U.S. at 795, suggests that, even in these states, the number of such sentences is not large. So do the reported decisions regarding the persons these two states have executed, the vast majority of whom have specifically been found at trial to have intentionally caused death.[11]

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[11] For Florida, see Dobbert v. Florida, 432 U.S. 282, 285 (1977); Washington v. Strickland, 578 F.2d 582, 586 (5th Cir. 1978); Witt v. Wainwright, 714 F.2d 1069, 1071 (11th Cir. 1983); Antone v. Strickland, 706 F.2d 1534, 1536 (11th Cir. 1983); Francois v. State, 407 So.2d 85, 89 (Fla. 1982); Palmes v. State, 397 So.2d 648, 652 (Fla. 1981); Goode v. State, 365 F.2d 381, 384 (Fla. 1979); Henry v. State, 328 So.2d 430, 438 (Fla. 1976); Solomon v. Kemp, 735 F.2d 395, 399 (11th Cir. 1984). For Georgia, see Green v. Zant, 738 F.2d 1529, 1534 (11th Cir. 1984); Stephens v. Zant, 631 F.2d 397, 402 (5th Cir. 1980); Smith v. State, 222 S.E.2d 308, 311 (Ga. 1976).

We believe that these facts show the centuries-long process of narrowing the felony murder rule,[12] and the longstanding reluctance to impose a death sentence solely on its basis,[13] have reached the

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12 The history of the felony murder rule--from its apparent inception in a mistranslation of Lord Dacre's Case, 72 Eng.Rep. 458 (K.B. 1535), through the extension by Lord Coke that Sir James Stephen called "astonishing" and "monstrous," see 3 Stephen, History of the Criminal Law of England, 57, 65 (1883), to its abolition in England and its increasing rejection in the United States--has often been told, and need not be recounted here. See, e.g., People v. Aaron, 299 N.W.2d 307 (Mich. 1980); Note, Felony Murder as a First Degree Offense: An Anachronism Retained, 66 Yale L.J. 427, 430-433 (1957); Brief for Petitioner, Enmund v. Florida, No. 81-5321 at 16-32.

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> At early common law, the felony murder rule went unchallenged because at that time all felonies were punishable by death. It was, therefore, "of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony."

People v. Aaron, supra, 299 N.W.2d at 310-311, quoting Commonwealth v. Redline,

point where "capital punishment within the confines of [such] ... statutes ... has for all practical purposes run its course." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Justice White). Although "current judgment ... is not wholly unanimous," Coker v. Georgia, supra, 433 U.S. at 596, it weighs heavily on the side of rejecting capital punishment for felony murder.

This does not gainsay that the felony murder rule itself--like the states' power to punish rape--is "beyond constitutional challenge." Lockett v. Ohio, supra, 438 U.S. at 602. But we submit that, as a justification for exacting death, it has become so "occasional and erratic," that it "is not only grossly out of proportion

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137 A.2d 472, 476 (Pa. 1958) (footnotes omitted). See also Holmes, The Common Law 58 (1881); ALI Model Penal Code §210.2, Comment, at 36 (1980).

to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment." Id. at 625 (concurring opinion of Justice White).

II. ONLY A RULE LIMITING THE KIND OF CRIMES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED CAN PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THOSE DEATH SENTENCES THE EIGHTH AMENDMENT PERMITS, AND THOSE IT DOES NOT.

We also believe a holding that the death penalty cannot be imposed solely for felony murder is most consistent with this Court's "reading of the Eighth Amendment as restricting legislatures' authority to choose which crimes to punish by death." Solem v. Helm, 103 S.Ct. 3001, 3021 (1983) (dissenting opinion of the Chief Justice) (emphasis added). We recognize that the majority in Solem applied a somewhat different analysis to the issue there,

looking to the facts of the individual case to compare "the gravity of the offense and the harshness of the penalty." Id. at 103 S.Ct. 3010. But Solem presented a difficult "problem ... of line-drawing," 103 S.Ct. at 3012; the issue here involves the "qualitative difference between death" and any alternative punishment. Zant v. Stephens, 462 U.S. 862, 884 (1983). It is not inconsistent with the logic of Solem to hold that a different kind of punishment can only be imposed for a different kind of crime.

Nor does this reasoning conflict with the Court's pronouncements that a sentencing jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment." Ramos v. California, 463 U.S. 992, 1008

(1983). Since Furman it has been settled that this kind of "individualized determination" is permissible only after application of an objective criterion which "genuinely narrow[s] the class of persons eligible for the death penalty and ... reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, supra, 462 U.S. at 877. A conviction of felony murder cannot do that.

> Permitting imposition of the death penalty solely on proof of felony murder ... necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded ... the [Justices] ... in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), in holding Georgia's death penalty statute unconstitutional. Whether the death results in the course of a felony (thus giving rise to felony murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendant.

Lockett v. Ohio, 438 U.S. at 620 (concurring opinion of Justice Marshall).

One need only examine the facts of some of this Court's recent cases in this area, to confirm that it is the defendant's intentions--and not his or her proximity to or involvement in the "fortuitous events" that cause death--that distinguishes "moral culpability". Where there is no "finding that the defendant engaged in conduct with the conscious purpose of producing death," id., 438 U.S. at 628 (concurring opinion of Justice White), we can perceive no clear difference between a person who is physically distant from the scene of a killing, see Enmund v. Florida, supra, or one who is immediately outside the building where the crime occurs, see Lockett v. Ohio, supra, or just beyond

view of it, see Bell v. Ohio, 438 U.S. 637 (1978), and Smith v. Oklahoma, 104 S.Ct. 324 (1984). Nor, with life at stake, can we find a principled distinction in the fact that a defendant may have been armed, Woodson v. North Carolina, 428 U.S. 240 (1976)--or even that he actually, though unintentionally, caused death himself, see Furman v. Georgia, supra, and Franklin v. Francis, 105 S.Ct. 1965 (1985).

In Bullock's own case, we cannot imagine it makes a constitutional difference that he was at the scene, or that he was physically in contact with the victim, if he did not contemplate that life would be taken. Even if he was in some sense an "active participant in the assault and homicide," Bullock v. State, 391 So.2d 601, 614 (Miss. 1980)--a conclusion we do not agree the record

fairly supports under 28 U.S.C. §2254(d)(8)--that does not make death proportionate "to his personal responsibility and moral guilt," Enmund v. Florida, supra, 458 U.S. at 801, if his intent was not to kill or aid a killing.[14]

Moreover, we see no way an appellate court could reconstruct these facts, if they were critical, with a confidence adequate to the "need for reliability in the determination that death is the appropriate punishment in a specific

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> "Every assault involves bodily harm but any doctrine which would hold every assailant as a murderer where death follows his act, would be barbarous and unreasonable." Wellar v. People, 30 Mich. 1620 (1874).
>
> While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law.

People v. Aaron, supra, 299 N.E.2d at 318.

case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion).[15] What can be decisively determined, though, is that at this criminal trial--"the time and place set for [the defendant] to be tried by a jury of his peers and found either guilty or not guilty," where "[t]o the greatest extent possible all issues which bear on this charge should be determined," Wainwright v. Sykes, 433 U.S. 72, 90 (1977)--there was no "finding that the defendant engaged in conduct with a conscious purpose of causing death...."

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[15] In this regard we find it remarkable, though not surprising, that, by our count, in only five cases decided elsewhere than the Fifth Circuit have death sentences been reversed under the authority of Enmund. See State v. McDaniel, supra; Brumbley v. State, 453 So.2d 381 (Fla. 1984); People v. Tiller, 447 N.E.2d 174 (Ill. 1982), cert. denied 461 U.S. 944 (1983); State v. Stokes, supra; State v. Oliver, 307 S.E.2d 304 (N.C. 1983).

Lockett v. Ohio, supra, 438 U.S. at 629 (concurring opinion of Justice White). That can and should dispose of this case.

We recognize that there may remain some uncertainties in "defin[ing] a convincing bright line rule such as was used in regard to rape," in the marginal cases involving unusual definitions of mens rea. Id. at 438 U.S. 614 (concurring opinion of Justice Blackmun). But those difficulties should be minor compared to those which would be presented by the ad hoc approach suggested by Petitioner here.

Most states already "make knowing, intentional, purposeful, or premeditated killing an element of capital murder."[16] Several others require proof a killing was "intentional" before a felony circumstance

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16 Enmund v. Florida, supra, 458 U.S. at 790. See id. at 789 n.6 and 7.

can make murder capital.[17] Even those states which do not require this in all cases, have primary definitions of murder which plainly encompass a "conscious purpose of causing death."[18] Sentences

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17 See the Indiana and Colorado statutes cited at n.3, above, and Carlos v. Superior Court, supra.

18 See Ariz. Rev. Stat. §13-1105 (1982-3) ("inten[tionally] or knowing[ly] ... causes ... death ... with premeditation"); Ark. Stats. Ann. §41-1501(b) ("premeditated and deliberated purpose of causing ... death"); Conn. Gen. Stat. Ann. §53-85-4(a)(b) (West Supp. 1981) ("intent to cause ... death"); Del. Code Ann. Tit. 11 §636 (1) ("intentionally ... causes death"); Fla. Stat. Ann. §782.04 ("premeditated design to effect ... death"); Ga. Code Ann. §26-1101 (Supp. 1983) ("malice aforethought"); Ken. Pen. Code §507.020(a) ("intent to cause ... death"); Md. Crim. Law Code Ann. §407 ("willful, deliberate and premeditated killing"); Miss. Code Ann. §97-3-19(1)(a) (1982) ("deliberate design to effect ... death"); Mont. Rev. Code Ann. §44-5-102(1)(a) (1981) ("purposely or knowingly [causes death]"); Rev. Stats. of Neb. §28.303(1) (1979) ("purposely and with deliberate and premeditated malice [kills]"); Nev. Rev. Stat. §200.080 ("malice aforethought"); Ok. Stat. Ann. §701.7 (1982) ("malice aforethought");

imposed pursuant to such definitions will be unaffected by the rule we propose. So may be less absolute definitions of mens rea, so long as they reflect an awareness of a likely loss of human life, and therefore relate to the moral and societal purposes the death penalty has been held to serve.[19] But the decision of that narrow, remaining question can await the

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S.C. Code §16-3-10 (Supp. 1980) ("malice aforethought"); Tenn. Code Ann. §39-2-202(a) (1982) ("willful, deliberate, malicious and premeditated killing"); Wyo. Stat. Ann. §6-4-101 (1977) ("purposefully and with premeditated malice").

[19] This kind of mens rea may be what the Court in Enmund was referring to, in its references to an "anticipa[tion] that lethal force would or might be used...." 458 U.S. at 788.

rare, remaining case in which such a definition of culpability may be used as a basis for a sentence of death.

Crawford Bullock's case does not present that question. His jury was told it made no difference if he acted "with or without any design to effect ... death." The death sentence imposed by that jury should be reversed.

Respectfully submitted,

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